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Viewing cable 08SANJOSE823, COSTA RICA STAGGERS INTO SECOND CAFTA EXTENSION

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Reference ID	Created	Released	Classification	Origin
08SANJOSE823	2008-10-15 22:43	2011-08-30 01:44	CONFIDENTIAL	Embassy San Jose

Appears in these articles:

<http://www.nacion.com/2011-03-02/Investigacion.aspx>

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SUBJECT: COSTA RICA STAGGERS INTO SECOND CAFTA EXTENSION

REF: A. A) SAN JOSE 745
[1](#)B. B) SAN JOSE 774

Classified By: POL/ECON Counselor David E. Henifin per 1.4 (d)

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SUMMARY

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¶1. (SBU) Implementing CAFTA continues to challenge the GOCR. The Constitutional Court's September 11 ruling that a portion of the 13th CAFTA bill was unconstitutional (Reftels), plus lingering technical issues in intellectual property (IP), triggered a second entry-into-force (EIF) extension request to Costa Rica,s CAFTA partners. The partners granted the extension on September 30, specifying a new EIF date of January 1. Also on September 30, President Arias asked visiting Commerce Secretary Carlos Gutierrez to deliver a proposal to USTR requesting EIF for the GOCR as soon as the 13th bill has been modified per the Court,s ruling and signed into law, regardless of the status of other outstanding issues. (This echoed Arias's request in a letter to POTUS on September 19.)

¶2. (SBU) Even with this latest extension, the GOCR has its work cut out for it. The 13th law likely faces another, opposition-driven review by the Constitutional Court. The four outstanding IP issues may require a new, 14th CAFTA bill. Also, the Arias administration must finalize CAFTA-related regulations, and launch a special intellectual property rights (IPR) enforcement office. Even under the best case scenario (in which a 14th law is not required), the GOCR may not complete all its remaining CAFTA tasks before January 1. END SUMMARY.

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INTO A SECOND OVERTIME . . .

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¶3. (SBU) Further to Ref B, during the third week of September, Foreign Trade (COMEX) Minister Marco Vinicio Ruiz formally requested an EIF extension from USTR. USTR and partner CAFTA countries agreed to an extension until January 1, 2009, with Washington-based COMs signing the prerequisite letter on September 30. (Nicaragua required special attention and did not sign until 19:45 Washington time). According to USTR, the GOCR expressed "a great political need" for a formalized extension process, no doubt a) to keep the pressure on the weary Arias administration and its fraying pro-CAFTA coalition in the legislature and b) to avoid buttressing the long-held view of the anti-CAFTA opposition that an EIF extension was never technically required (thus leaving time to renegotiate to "soften" some of the alleged impacts of CAFTA).

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. . . WHILE FIGHTING ON THREE FRONTS

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¶4. (U) The GOCR clearly needs the extra time, first to respond to the controversial Constitutional Court decision. The Court found one section of the 13th bill (the IPR catch-all bill) to be unconstitutional because the GOCR did not consult with Costa Rica,s indigenous communities, in compliance with ILO Convention 169, regarding CAFTA-generated changes in the existing biodiversity law that could affect those communities.

¶5. (SBU) The national legislature is to begin debate the week of October 13 on a modified bill, which stripped out the section the Court found objectionable. This should de-couple the indigenous consultation issue from CAFTA EIF. However, the PAC-led opposition, emboldened by the latest delay and seeing one last opportunity to block CAFTA, has already called for a Court review of the "fixed" law. The GOCR hopes the bill will be approved in first reading and passed to the Court for action by the week of October 20.

¶6. (SBU) VM Roberto Thompson, who is managing the process for the Presidencia, was cautiously optimistic when we met with him on October 14. The Constitutional Court has given informal signals that it will complete its review well before

the 30 days allotted, and will not raise new concerns about the modified law.

¶7. (SBU) Thompson acknowledged, however, that some potential roadblocks remain. The national Human Rights Ombudswoman, a well-known CAFTA opponent, has the right to ask for Constitutional Court review of any law and is apparently mulling this over for the 13th CAFTA bill. Also, the behavior of the Court, despite the GOCR,s optimism, cannot be guaranteed in advance. With erstwhile pro-CAFTA allies in the Libertarian Party join the PAC in stubbornly decrying the incorrect procedures used by the GOCR to correct the 13th law, their vote is not 100 percent assured, either. Even with those risks, Thompson predicted the bill should be reviewed by the Court, approved by the legislature in second reading, and signed into law in November, at the latest.

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ATTACK ON THE PAC

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¶8. (SBU) In anticipation of the second Court review, the worried private sector resumed its media campaign against the PAC for once again delaying CAFTA implementation and ignoring the will of the people as expressed by the 2007 referendum ratifying CAFTA. AmCham contacts told us they wanted PAC to "pay the full political cost" for the continued delays, and they hoped the ads would moderate that party,s obstructionism, as a similar campaign did earlier this year. Six different ads ran on TV and radio the week of October 6, accompanied by full page newspaper ads. 3500 textile workers also petitioned the GOCR to implement CAFTA quickly to protect their jobs.

¶9. (U) The ads seem to have found their mark. In a press conference on October 14, PAC leader Otton Solis furiously insisted that the GOCR, and not his party, should be blamed for any CAFTA delays, and alleged (outrageously) that "dirty narcotrafficking money" had funded the ads against his party. In addition, the pro-CAFTA coalition is hoping the campaign may also remind the court of the political fallout that would ensue if CAFTA EIF were blocked.

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SECOND FRONT: TECHNICAL ISSUES, . . .

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¶10. (SBU) In addition, the GOCR must address four remaining IP issues, which although seemingly small, are legally material and thus essential to CAFTA compliance. The IP enforcement bill (signed into law in August) is missing one word ("performance") which effects the definition of criminality. In the trouble-plagued IPR catch-all bill, there are three instances where a word was added which materially changed the meaning and harmed copyright and data protection IP concepts. USTR believes a new 14th "technical corrections" bill is the only way to make these necessary changes.

¶11. (SBU) Under other circumstances in other FTA negotiations, such a seemingly simple piece of legislation would be an easy fix, but the political and institutional situation is different in Costa Rica at this time. GOCR officials, including Legislature President Francisco Pacheco, VM Amparo Pacheco (COMEX) and VM Thompson (Presidencia), as well as key private sector contacts, are confident they can squeeze "one more vote" out of the cumbersome, 38-seat pro-CAFTA coalition, but that,s it. This last vote would be to approve the "fixed" 13th bill, assuming the Constitutional Court finds no new problems. (Any item of legislation must be approved by two plenary votes in Costa Rica to become law.)

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. . . AND ONE LAW TOO MANY?

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¶12. (SBU) Our contacts are highly pessimistic about the

prospects of new CAFTA-related legislation, however. A technical corrections bill would not be introduced until December, they tell us, once the annual budget is approved (since this takes precedence over all other legislative action in November) and once the executive branch can again set the legislative agenda (it can do so in the December-April extraordinary session). Given the deep-seated CAFTA fatigue in the legislature, swift action on this last bill is not assured. As Thompson explained, 38 votes would again be needed to limit debate on such a bill, otherwise discussion could be endless.

¶13. (SBU) Our interlocutors also worry that any new CAFTA-related bill risks giving more ammunition to the anti-CAFTA opposition. PAC party leader (and presidential candidate) Solis, in a letter passed to the Embassy during Secretary Gutierrez's visit, has already called for the IPR catch-all bill to be removed from the CAFTA implementation package entirely (which is a non-starter), alleging that the USG used delays in the implementation process to "place new demands "on Costa Rica. Solis also insisted (again) that CAFTA be re-negotiated with Costa Rica.

¶14. (SBU) Introducing a new, 14th bill does risk making the USG the issue, since it would fuel Solis,s and other CAFTA opponents' arguments that the USG added one more CAFTA requirement "at the last minute." With the early political maneuvering in full swing for the 2009-2010 election campaign, and with the Arias administration down in the polls and feeling against the ropes, GOCR officials and pro-CAFTA legislators fear that even technical corrections legislation would be a bill too far. Best case: completing work on such a bill probably would delay EIF into the new year.

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THE "SIDE LETTER" GAMBIT

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¶15. (SBU) Given the GOCR,s strong aversion to introducing and processing another CAFTA bill, Arias used Commerce Secretary Gutierrez,s visit to propose an alternate course of action, which, if accepted, would permit Costa Rica,s CAFTA EIF on January 1 (or as soon as the 13th bill becomes law), regardless of progress on the other issues. The GOCR would pledge to complete any remaining issues as soon as possible after January 1, in a side letter signed by President Arias himself, if that were necessary. In the GOCR,s (accurate) calculus, EIF would make Solis,s and the opposition,s arguments moot.

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THIRD FRONT: IPR ENFORCEMENT

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¶16. (SBU) The GOCR's third front is fulfilling the handshake agreement with USTR to create a special enforcement office (SEO) to enforce IP law and prosecute IP crimes. As explained to Ambassador Cianchette and DCM Brennan in early August by COMEX Minister Ruiz, the GOCR,s Fiscal General, Francisco Dall'Anese, must request the authorization of the funds for the SEO from the Corte Plena, the full 22-member Supreme Court.

¶17. (SBU) Since then, the Arias administration and President of the Supreme Court Luis Paulino Mora have acknowledged to us the importance of launching the SEO, and Dall'Anese and then-Minister of Justice Laura Chinchilla exchanged letters on the topic. Progress has been slow, however. The Fiscal General's most recent letter named a prosecutor, a location of the office, and responsibilities by citing articles from IP law, but the SEO does not yet have a budget, office or staff.

¶18. (SBU) We are continuing our pressure, enlisting a number of private sector allies and lower-level GOCR officials who well understand the need for, and importance of, effective IPR enforcement, not only for CAFTA, but also for TRIPS and Special 301 compliance. Thompson told us October 14 that he

would push again for a proper budget and staff for the new
SEO.

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REGULATIONS MOVING, AT LEAST
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¶19. (SBU) The Costa Rican Embassy in Washington has provided one piece of good news, at least. The GOCR will soon finalize the remaining CAFTA-related regulations on telecommunications, and the new regulatory body, SUTEL, should staff its board by October 31.

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COMMENT
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¶20. (SBU) We provide this context as an explanation, not an excuse. Renewed GOCR leadership and private sector pressure should keep CAFTA from derailing in Costa Rica at the last minute. Although more grouchy than inspirational, President Arias has been slightly more vocal recently in pressing PAC and the anti-CAFTA opposition to respect the will of the people and get CAFTA done.

¶21. (SBU) The latest extension is not all bad. Although due mostly to the Court,s rejection of the 13th bill, it has given both sides more time to work out the final thorny technical issues, and it has avoided the politically problematic scenario of the GOCR seeming to have completed all its EIF work by the earlier October 1 deadline, only to have the USG appear to "deny" CAFTA compliance certification because of a few outstanding issues.

¶22. (C) Leadership, pressure and time may not be enough to ensure Costa Rica,s CAFTA EIF, however. Although the USG has shown considerable flexibility through this long and torturous saga, a little more may be required, in particular given CAFTA's importance to USG policy in the region in general, and on trade, in particular. If Arias's proposal is not accepted, for example, and a 14th CAFTA bill is required, then we do not expect to see Costa Rican EIF until early 2009, and perhaps later. This might give PAC leader Solis and other CAFTA opponents the last chance they seek to push Costa Rica's EIF into the next U.S. administration, during which they still believe they may be able to "get a better deal" on CAFTA for Costa Rica. Such a notion may be totally misguided, but combined with a tired, deflated Arias administration and the many "veto points" built into the hyper-legalistic Costa Rican political system, Solis and the anti-CAFTA forces still have weapons to deploy.

CIANCHETTE